A

BOO ARE NGOR

v.

CHUA MEE LIANG

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASAN LAH JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NO: J-02-1019-2007]

C

24 APRIL 2008

CIVIL PROCEDURE: *Striking out - Second suit - Appeal against dismissal of application to strike out - Whether second suit an abuse of process since first suit struck out for non-compliance with court's directions*

D

- Whether appellant acquiesced to continuation and prosecution of second suit - Whether appellant estopped from striking out second suit

The High Court struck out the first suit instituted by the respondent on the grounds that the respondent did not comply with the directions given by the said court as to the conduct of

E

that suit. The respondent did not appeal against that order but instead filed a second suit against the appellant. Some four years later, the appellant applied to strike out the second suit on the ground that it amounted to an abuse of the court's process. The High Court dismissed that application. Hence, the appellant's

F

appeal.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

G

(1) As a general rule, where a plaintiff's action is struck out for disobedience of a peremptory order, a second action would constitute an abuse of the process of the court. The same holds true where the order is in the nature of a peremptory

H

order. However, in the present case several steps were taken within the second suit after it was filed. No application was made at once by the appellant to strike out the second action. Instead she quite freely participated in all the procedural steps within the second suit including attending the pre-trial

I

conferences during case management. In light of her conduct she could not now be heard to complain that the second suit was an abuse of the court's process. (paras 4 & 5)

(2) A litigant may by his or her conduct be estopped from asserting facts or taking a position that would be fatal to her opponent's case. In this instance, the appellant, when confronted with the second suit, had clearly two alternative and mutually exclusive courses of action open to her. She could have either applied at once to have the second suit struck out as constituting an abuse of the court's process. Alternatively, she could have acquiesced in its continuation and prosecution. It was the latter course she adopted. Having done so, she could not now be heard to say that the second suit should be struck out as an abuse of the court's process. (paras 6 & 7)

Bahasa Malaysia *Translation Of Headnotes*

Mahkamah Tinggi telah membatalkan guaman pertama yang difailkan oleh responden atas alasan bahawa responden gagal mematuhi beberapa arahan yang diberikan mahkamah berhubung pengendalian guaman tersebut. Responden tidak merayu terhadap perintah pembatalan, sebaliknya telah memfailkan guaman yang kedua terhadap perayu. Kira-kira empat tahun kemudian, perayu memohon untuk membatalkan guaman kedua atas alasan bahawa ia adalah satu salahguna proses mahkamah. Mahkamah Tinggi menolak permohonan dan perayu merayu.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Sebagai satu kaedah am, di mana tindakan plaintif dibatalkan kerana tidak mematuhi suatu perintah muktamad, memfailkan tindakan kedua adalah satu salahguna proses mahkamah. Inilah keadaan jika perintah adalah suatu perintah yang muktamad. Bagaimanapun, dalam kes semasa, langkah-langkah tertentu telah diambil dalam lengkongan guaman kedua setelah ianya difailkan. Walaupun begitu, tiada permohonan segera dibuat oleh perayu untuk membatalkan guaman kedua itu. Perayu, sebaliknya, telah melibatkan diri dalam semua langkah-langkah prosedur yang diambil dalam tindakan kedua tersebut, termasuk menghadiri mesyuarat-mesyuarat pra-perbicaraan semasa pengurusan kes. Mengambilkira kelakuannya ini, perayu tidak boleh kini dibenarkan merungut bahawa guaman kedua adalah satu salahguna proses mahkamah.

A (2) Seseorang litigan boleh, berdasarkan tingkah lakunya, dihalang dari membangkitkan fakta-fakta atau mengambil satu pendirian yang akan memudaratkan kes lawannya. Dalam kes ini, perayu, apabila berhadapan dengan guaman kedua, mempunyai dua alternatif atau dua cara bertindak 'mutually exclusive' yang B terbuka untuknya. Beliau boleh dengan serta merta memohon untuk membatalkan guaman kedua atas alasan ia satu salahguna proses mahkamah, dan secara alternatifnya, beliau boleh sahaja berkecimpung di dalam guaman tersebut. Perayu memilih jalan yang kedua, dan setelah berbuat demikian beliau C tidak boleh berkata bahawa guaman kedua harus dibatalkan kerana ia satu salahguna proses mahkamah.

Case(s) referred to:
Janov v. Morris [1981] 3 All ER 78 ***(refd)***
D *Lim Oh v Allen & Gledhill [2001] 3 CLJ 233 FC* ***(refd)***
Meng Leong Development Pte Ltd v. Jip Hong [1985] 1 CLJ 20; [1985] CLJ (Rep) 8 PC ***(refd)***

Other source(s) referred to:
The Law relating to Estoppel by Representation, 3rd edn, 1977, para 310

E *For the appellant - SE Wong (Lum Chee Seng with him); M/s SE Wong & Co*
For the respondent - Cheng Tau Sian (Wong You Fong with him); M/s Henry Soong & Chang

F *[Appeal from High Court, Muar; Civil Suit No: 22-49-2002]*

Reported by Usha Thiagarajah

G **JUDGMENT**

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

H **[2]** On Monday 21 April 2007 this court was moved for an order to admit a further record of appeal. We took the view, that having regard to the urgency of the matter, the motion should be treated as the appeal proper and we so directed. At the time we made that order we were unaware that the appeal records were I indeed available already to us. This morning we have heard argument on the substantive appeal. In the circumstances we make an order in terms of the motion before us.

[3] On 2 April 1996 the respondent before us (plaintiff in the court below) filed an action against the appellant (defendant in the court below) for breach of trust. For convenience we will call this the first suit. On 12 August 1999 the High Court gave directions as to the conduct of that suit. The plaintiff did not comply with these directions. Then, on 9 March 2002 the High Court acting on a notice to show cause issued by it on 15 January 2002 made an order striking out the first suit. The respondent did not appeal against this order. Instead she filed a second suit against the appellant. This second suit was filed on 3 April 2002. On 19 April 2006, that is to say, some four years later, the appellant took out a summons to strike out the second suit on the ground that it amounted to an abuse of the court's process. The High Court dismissed that application. Hence this appeal.

[4] After having very carefully considered the arguments advanced before us, we have come to a conclusion that this appeal must fail. Our reasons are as follows. It is settled law that where a plaintiff's action is struck out for disobedience of a peremptory order, a second action, as a general rule, would constitute an abuse of the process of the court. See, *Janov v. Morris* [1981] 3 All ER 78. The same holds true where the order is in the nature of a peremptory order. See, *Lim Oh v Allen & Gledhill* [2001] 3 CLJ 233. Had this been the principle applicable to the facts here we would have had no hesitation in allowing the appeal. But the facts before us are very different.

[5] It is clear from the record provided to us that after the second suit had been filed several steps were taken within it by both sides. No application was made at once by the instant appellant to strike out the second action. Instead she quite freely participated in all the procedural steps within the second suit, including attending the pre-trial conferences during case management. In the light of her conduct she cannot now be heard to complain that the second suit is an abuse of the court's process.

[6] There is high authority for the proposition that a litigant may by his or her conduct be estopped from asserting facts or taking a position which would be fatal to her opponent's case. In *Meng Leong Development Pte. Ltd. v. Jip Hong* [1985] 1 CLJ 20; [1985] CLJ (Rep) 8, Lord Templeman when delivering the Advice of the

A Judicial Committee of the Privy Council cited with approval the following passage in Spencer, Bower and Turner on *'The Law relating to Estoppel by Representation'* 3rd edn (1977), para. 310 which reads as follows:

B > Where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his
C detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. It is of the essence of election that the party electing shall be 'confronted' with two mutually exclusive courses of action between which he must, in fairness to the other party, make his
D choice.

[7] In the present instance, the appellant, when confronted with the second suit had clearly two alternative and mutually exclusive courses of action open to her. She could have either applied at once to have the second suit struck out as constituting an abuse
E of the court's process. Alternatively, she could have acquiesced in its continuation and prosecution. It is the latter course she adopted. Having done so, she cannot now be heard to say that the second suit should be struck out as an abuse of the court's process.
F

[8] For the reasons already given we agree with the orders made by the learned judge. This appeal is devoid of any merits. It is dismissed. The costs of this appeal must be paid by the appellant to the respondent. The deposit in court shall be paid out to the
G respondent to account of taxed costs. For completeness we affirm all orders made by the High Court.

H

I